SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

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STERE GOGU,

Plaintiff,

- v -

GAP, INC., AMDAR COMPANY, LLC, METRO REAL ESTATE MANAGEMENT CO. d/b/a MANOCHERIAN BROTHERS s/h/a THE MANOCHERIAN BROTHERS, ALEXANDER DIMITROV, and GEORGE E. HARVEY,

Defendants.

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INDEX NO. 161370/2017

MOTION DATE 03/20/2019

MOTION SEQ. NO. 002, 003

DECISION + ORDER ON MOTION

NYSCEF Doc Nos. 32–47, 49–53, 74, 76, 78, and 85–97 were read on motion seq. 002 for summary judgment.
NYSCEF Doc Nos. 54–73, 75, and 79–84 were read on motion seq. 003 for summary judgment.

Motion seq. 002 by defendant The Gap, Inc. i/s/h/a Gap, Inc. pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against it is granted, that branch of its motion that was for summary judgment granting it contractual indemnification from defendant Amdar Company, LLC is denied, and the complaint and all cross claims are dismissed with prejudice as against The Gap, Inc.

Motion seq. 003 by defendants Amdar Company, LLC and Metro Real Estate Management Co. d/b/a Manocherian Brothers s/h/a The Manocherian Brothers pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims is granted as to the cross claims of defendants Alexander Dimitrov and George E. Harvey, there being no opposition submitted, and is granted as to the cross claims of The Gap, Inc., and the motion is otherwise denied.

Motion Sequence Numbers 002 and 003 are hereby consolidated for disposition.

BACKGROUND

In this personal injury action, Plaintiff Stere Gogu alleges that he suffered serious injuries on October 22, 2017, after tripping on a defective and negligently maintained sidewalk while fleeing from a vehicle, owned by defendant George E. Harvey and operated by defendant Alexander Dimitrov, that had jumped the curb in front of a Gap store at 746-750 Broadway in Manhattan (the Building) (Prisco Affirm. [Dkt. 33], Ex. B [Dkt. 35] [Verified Complaint] [Compl.] ¶¶ 10, 37).[1] The Building is owned by defendant Amdar Company, LLC ("Amdar") (*id.*, ¶ 20, Prisco Affirm., Ex. C [Dkt. 36] [Amdar Answer], ¶ 6), is managed by defendant Metro

[1] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

Real Estate Management d/b/a Manocherian Brothers s/h/a The Manocherian Brothers ("Metro") (Lechleitner Affirm., ¶ and leased as relevant here to The Gap, Inc. (the "Gap") (Compl. ¶ 13, Prisco Affirm., Ex. C [Gap Answer], ¶ 3). Plaintiff was approximately 75 years old at the time of the accident (11/7/2018 Order granting a trial preference [Dkt. 48]).

The Police Report

According to the police report (Prisco Affirm., Ex. H [Dkt. 41]), the accident occurred on October 22, 2017, at 11:27 a.m., at Broadway and 8th Street. Under the "Accident Description/Officer's Notes" the report states:

> At T/P/O [time/place/occurrence] front passenger states driver [Dimitrov][2] was driving [eastbound] on East 8th Street. Upon making a right turn on Broadway driver suffered a seizure and struck pedestrian [plaintiff] on sidewalk and hit the Gap store. Pedestrian suffered severe bleeding to the body and head. No structure damage to the building. Damage only to front door. Pedestrian removed to Bellevue Hospital by EMS #8194. Driver removed to Lenox Hill Hospital by EMS.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed as a barber at Astor Hairstyle, located at Two Astor Place (Prisco Affirm., Ex. A [Dkt. 34] [Gogu Deposition Transcript], 14:13-15, 22:11-14, 124:24-125:7]). He left work and walked up Broadway about half a block to put a bill in a mailbox located approximately four to six feet from the corner of Broadway and 8th Street (*id.*, 18:7-10, 22:11-14, 40:6-15). He deposited the bill and, while facing the mailbox, looked over his shoulder and saw people running and scattering, with a white van driving on the sidewalk and toward him (*id.*, 27:12-20, 38:4-6, 38:13-16, 48:5-14). He said he could not figure out how fast the van was going, but, when pressed, estimated that its speed was 30 or 40 miles an hour (*id.*, 38:7-12). He saw people running and screaming, and stated that "I was in panic because I see the car coming straight to me and I start to run . . . [w]hen I run, I trip, and I fell down" (*id.*, 47:14-16, 89:2-4, 96:16-17). More specifically, he testified:

> A: . . . I see the car come to the sidewalk, and I turned to the right side. And I step on the concrete, there was holes, and I fell down. (*Id*, 27:19-22).

* * *

> Q: When you began to now run, you were running towards 8th Street, correct?

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[2] On June 6, 2018, counsel for Dimitrov and Harvey e-filed a Stipulation of Partial Discontinuance, dated May 23, 2018, by and between counsel for Plaintiff and counsel for Dimitrov and Harvey, agreeing to discontinue the action with prejudice as against Dimitrov and Harvey (Dkt. 19). Pursuant to CPLR 3217 (a) (2), such a stipulation must be "in writing signed by the attorneys of record for all parties." (*See also C.W. Brown, Inc. v HCE, Inc.*, 8 AD3d 520, 521 [2d Dept 2004].) Here, this was not done. As such, this stipulation was ineffective as to any discontinuance of the action as against Dimitrov and Harvey, and they remain party defendants. To the extent that Plaintiff has settled as to Dimitrov and Harvey, about which the Stipulation is silent, but to which passing reference is made by counsel for Amdar and Metro (Dkt. 55, affirmation of Lechleitner ¶ 11), see General Obligations Law § 15-108.

A. Correct.
Q. Okay.
A. No, on Broadway.
Q. You were on Broadway?
A. Yes.
Q. Okay.
A. This happened on Broadway.
Q. And you were near the mailbox, correct?
A. Yes.
Q. And when you saw people running, your reaction was to run towards 8th Street, correct?
A. Yeah. I have to run to 8th Street. (*Id*, 32:16-33:6)

* * *

Q. How many steps did you take before you fell to the ground?
A. Two steps. (*Id.*, 33:12-13).

* * *

A: . . . I make two steps.
Q: Okay. And you made two steps. Was it backwards or towards 8th Street?
A: In the front to run by the corner.
Q: Towards 8th Street?
A: Yes.
Q: Were you – were those two steps in a straight line towards 8th Street, a diagonal, or how could you describe it?
A: I have to go straight and then I trip, I fell down. (*Id.*, 47:15-48:1).

* * *

Q: Now, after turning to the right, did you walk any footsteps before you became aware of the vehicle that eventually ran you down?
A. Two feet. (Indicating.)
Q. Okay. Two feet or two footsteps?
A. Two footstep.
Q. Okay. So you walked two footsteps towards 8th street, correct?
A. No, on Broadway.
Q. Okay. But you walked those two footsteps –
A. From the mailbox.
Q. Let me finish. You walked those two footsteps on the sidewalk of Broadway towards 8th Street, correct?
A. Correct. (*Id.*, 94:8-23).

* * *

Q: Once you realized that there was this problem with the white van, what is the very first thing, if anything, that you did?
A: But this happened in one second.
Q: I understand. But in that approximate one second, what is the very next thing that you did?
A: I had to run.
Q: So at the time that the accident started for you, you were running. Is that correct?
A: Yes. I wanted to run. I want to run. I make one step and I fall. And I go down.
Q. But the one step you made was the start of running, correct?
A: Correct.
Q: And then you fell?
A: Yes. (*Id.*, 96:21-97:13).

Plaintiff said he tripped when his right foot went into what he described as a "hole" in the concrete that was about three inches deep (*id.*, 120:21-122:5). He fell next to the mailbox, and the front of the van then ran him over (*id.*, 26:10-12, 98:9-11, 99:9-14, 99:25-100:9). He lost consciousness after two seconds and only woke up when he was in the hospital (*id.*, 27:19-23). Plaintiff also testified that he believed that a woman next to him was hit because he saw her fall down, and when he was at the hospital, he saw that her dress had been placed on his back (*id.*, 31:5-10). He did not know whether she also tripped on the sidewalk (*id.*, 34:19-20).

Plaintiff stated that he believed if he had not tripped, the van would not have hit him (*id.*, 3:25-39:13). He was wearing sneakers, was generally very active, and did not have any difficulty walking or with his balance (*id.*, 41:17-25). It was a clear day with no snow or ice on the ground, and he had been on that part of the sidewalk many times before (*id.*, 16:17-17:5, 17:21-23).

At his deposition, plaintiff was shown photographs of the area of the sidewalk on which he fell. He stated that he believed that one of them, marked as exhibit C (Lechleitner Affirm. [Dkt. 55], Ex. K [Dkt.68]), was taken by a co-worker on the day of the accident, but did not know who took the rest (Gogu Dep., 18:20-24, 19:11-22, 35:13-21). When asked to identify what made him trip, he circled on the photograph marked as exhibit H (Lechleitner Affirm., Ex. K) what appears to be a flat, darkened rectangular object, a few inches long, embedded in the space between the edges of two sidewalk flags, and in line with the mailbox, stating, "it was broke over here" (Gogu Dep., 43:12-25). He confirmed that the photograph fairly and accurately depicted the defect as it appeared on the day of the accident (*id.*, 79:9-11), as he did when presented with another photograph of the scene marked as exhibit I (Lechleitner Affirm., Ex. K), which showed a person stepping onto the defect (*id.*, 46:8-24).

Plaintiff also testified that he had not been able to see what he tripped on just before he was hit by the van (*id.*, 51:3-6). Plaintiff said he saw the defect when he visited the accident scene about a week before his deposition – which was taken on June 5, 2018 (*id.*, 51:7-18). Plaintiff later clarified that the sidewalk had been repaired by then (*id.*, 78:2-7).

Plaintiff was also asked if he ever complained about the sidewalk defect prior to the accident. He said that he complained "to people", that "people complain, I complain, everybody

complain," that "they don't fix" and that "the holes and concrete was there long time" (*id.*, 77:6-25, 78:5-6). When asked to focus on the particular defect he had circled, however, he replied that he had never complained about it and did not know if any other person had ever tripped over it (*id.*, 80:12-21).

Plaintiff testified that the told a doctor at the hospital that he had tripped (*id.*, 116:22-117:5). He also stated that he "absolutely" told the police that he had tripped and had fallen down, but said the police did not ask him how he tripped (*id.*, 109:14-17). When asked a second time if he told the police that he tripped, he replied, "No, I did not. Because they come with report after" (*id.*, 109:18-21).

Deposition Testimony of Corey St. John

Mr. Corey St. John was an assistant manager at the Gap on the day of the accident (Lechleitner Affirm., Ex. M [Dkt. 69] [St. John Deposition Transcript], 7:3-5). He did not witness the accident. He testified that he assumed that the landlord, rather than the Gap, was responsible for sweeping the sidewalk and removing ice by shoveling, salting, or sanding (*id.*, 11:19-12:6). He stated that if there was a defect in the sidewalk, the Gap would reach out to the landlord for repairs (*id.*, 12:7-15). He was also shown a picture of the area on which plaintiff fell and was asked if he had seen what appears to be a lighter patch of concrete next to rectangular object that plaintiff claimed caused his fall. Mr. St. John replied that he was not sure and did not know whether any of the sidewalk had been repaired previously (*id.* 13:25-14:16). He also testified that he never noticed the defect that plaintiff identified (*id.*, 14:17-23). He said that the sidewalk had been ripped up in preparation for repaving about three weeks before his deposition (which was taken on June 18, 2018) (*id.*, 15:3-16:9).

Deposition Testimony of Adel Kolenovic

Mr. Adel Kolenovic was a porter employed by Amdar at the building leased by the Gap (Lechleitner Affirm., Ex. M [Dkt. 70] [Kolenovic Deposition Transcript], 7:16-18). His duties included sweeping and removing snow from the sidewalk outside of the Gap (*id.*, 25:4-11). He did not know if anyone from the Gap ever swept the sidewalks (*id.*, 27:20-22). He did not remember whether repairs had previously been made to the area of the sidewalk where plaintiff tripped, and did not know whether anyone from Amdar was responsible for such repairs (*id.*, 15:24-16:12).

The Lease

Amdar, as Owner, and the Gap, as Tenant, entered into a Standard Form of Store Lease, dated February 1, 1997 (the Lease) (Lechleitner Affirm., Ex. C [Dkt. 58-59], which was in effect on the date of the accident pursuant to a Fourth Amendment to Lease made as of January 3, 2014. As is relevant to the instant motion, paragraph 4 of the Lease, "Repairs," provides:

> Owner shall maintain and repair ~~the public portions of the building~~, both exterior and interior . . . . . Tenant shall, throughout the term of this lease, take good care of the interior non-structural portions of the demised premises and the fixtures and

> appurtenances therein ~~and the sidewalks adjacent thereto~~ and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonably wear and tear, obsolescence and damage from the elements, fire or other casualty excepted.

(Strikeouts in original). Paragraph 30, "Elevators, Heat, Cleaning," provides:

> Tenant shall, at tenant's own expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto *made necessary by its occupancy or negligence*, and keep said sidewalks and curbs free from snow, ice, dirt and rubbish.

The italicized language was typed into the margins of the standard form.

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

For the following reasons, the motion by the Gap in seq. 002 pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims against it is granted, there being no opposition submitted by Dimitrov and Harvey, and that branch of the motion which sought indemnification from Amdar is denied. The motion by Amdar and Metro (collectively hereinafter "Amdar") in seq. 003 pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims against it is granted in part to the extent that the cross claims of Dimitrov and Harvey are dismissed, there being no opposition submitted, the cross claims of the Gap are also dismissed, and the motion is otherwise denied.

I. Amdar's Motion to Dismiss (Seq. 003)

In moving to dismiss the complaint as against Amdar and Metro in its entirety, Amdar argues that: (1) it was physically impossible for the accident to have occurred as plaintiff alleges;

(2) plaintiff's claim as to what made him trip is entirely speculative; (3) the alleged defect was trivial; and (4) the defect was not the proximate cause of plaintiff's injuries.

1. Impossibility

Amdar argues that, based on plaintiff's own testimony, he could not have tripped on the part of the sidewalk that he identified as the location of his fall. Specifically, Amdar notes that the rectangular object in the photograph is in line with the mailbox, and that plaintiff claims he had turned to the right of the mailbox and taken two steps forward from it toward 8th Street before he fell. Accordingly, Amdar concludes, the object would have already been a few feet behind him and could not have caused his fall. Amdar also asserts that plaintiff could not have been struck by the front of the van because the photographic evidence (marked as deposition exhibit A) shows that the van came to rest past the mailbox and the rectangular object.

Notwithstanding that credibility issues are generally a matter for the trier of fact, on a motion for summary judgment in a personal injury action, a court may deem testimony "utterly incredible as a matter of law when it is manifestly untrue, physically impossible, or contrary to common experience" (*Price v City of New York*, 172 AD3d 625, 2019 WL 2292011 [1st Dept 2019]; *see Espinal v Trezechahn 1065 Ave. of Americas, LLC*, 94 AD3d 611, 613, [1st Dept 2012]). In *Price*, the First Department upheld the dismissal of a claim by a plaintiff who asserted that that a police officer let him dangle from a rain gutter without attempting a rescue, where plaintiff's testimony established that his eyes would have been below the level of the roof so that he could not have seen the officer standing on it nine to ten feet away, and where the plaintiff claimed to have been able to hold on for a full 20 minutes (*Price*, 2019 WL 2292011,*3). In *Espinal*, the First Department reversed the denial of summary judgment to a building owner and elevator company where it found inherently incredible the plaintiff's testimony that an elevator moved up and down the shaft at twice its normal speed for approximately one hour before stopping in the lobby, and where the plaintiff had failed to come forth with an expert to counter the defendants' expert's opinion that the alleged incident was mechanically impossible (*Espinal*, 94 AD3d 611, 613).

In the instant case, the Court does not find plaintiff's testimony, considered in its totality, to be inherently incredible. While it would have been physically impossible for plaintiff to have tripped over a defect that was already two steps behind him, the deposition transcript does not provide a clear account of what transpired. Plaintiff's seeming agreement that he took two steps forward toward 8th Street was elicited only after a number of leading questions by defense counsel.[3] When first asked if the two steps were made toward 8th Street, he twice replied "No, on Broadway." When asked again, he said "From the mailbox." He later indicated that he took only one step, not two, before falling. Plaintiff repeatedly stated that he felt he "had to" or wanted to run forward, but his testimony does not unambiguously confirm that he actually did so. It equally supports the theory that he was only able to take one step sideways from the mailbox when he tripped and was propelled to the ground into the path of the van. Plaintiff's testimony must also be considered in the context of the accident, which took place in a matter of mere moments and

[3] The Court notes that plaintiff's English is imperfect; his native language is Romanian (Gogu Dep. 11:24-25). A number of plaintiff's answers were non-responsive as a result of an inability to understand the questions.

required split-second reactions from plaintiff and other panicked bystanders. As such, the Court declines to grant the motion on this basis.

2. Speculation

Amdar contends that plaintiff has offered nothing but speculation regarding that it was the rectangular object which caused him to trip. Amdar points to plaintiff's testimony that he did not see the rectangular object at the time that he fell, had not seen it prior to the day of the accident, and only concluded that it caused his accident many months later.

"It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury" (*Siegel v City of New York*, 86 AD3d 452, 454 [1st Dept 2011]; *see also Morrissey v New York City Tr. Auth.*, 100 AD3d 464, 464 [1st Dept 2012]; *Washington v New York City Bd. of Educ.*, 95 AD3d 739, 739–740 [1st Dept 2012]). "While plaintiff's evidence need not positively exclude every possible cause of his fall other than the alleged . . . defects, it must be sufficient to permit a finding of proximate cause based on logical inferences, not speculation" (*Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006], *lv denied* 8 NY3d 801 [2007]). Where a plaintiff can identify on a photograph the area causing the fall summary judgment should be denied, and the testimony is not rendered speculative merely because plaintiff fails to pinpoint the exact location, clarifies the testimony upon additional questioning, or has proposed other possible causes in the pleadings (*Figueroa v City of New York*, 126 AD3d 438, 440 [1st Dept 2015]; *Taveras v 1149 Webster Realty Corp.*, 134 AD3d 495, 496 (1st Dept 2015), *aff'd,* 28 NY3d 958 [2016]; *Kovach v PJA, LLC*, 128 AD3d 445, 445 [1st Dept 2015] [summary judgment denied where plaintiff alleged she broke her nose after her foot hit a bump in the sidewalk, even though she could not identify the particular defect in the photographs).

Here, the Court finds it is sufficient for the purposes of withstanding the instant motion for summary judgment on the ground of speculation that plaintiff testified that he felt his foot hit a hole in the sidewalk before he fell and was able to identify it in a photograph. Although plaintiff did not see it at the precise time of the accident, he testified to having previously seen holes in that area. The confusion over whether he had seen it during the visit a week before his deposition does not render his testimony speculative.

3. Triviality

Amdar further argues that the defect was a mere "expansion joint" that was level with the sidewalk flags and was therefore trivial in nature.

Even if a plaintiff has established that a defendant is responsible for a sidewalk defect, it must also be shown that the defect is substantial, not trivial. Whether a defect is trivial as a matter of law requires considering of "the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*Flores v New York City Transit Auth.*, 147 AD3d 553, 554 [1st Dept 2017], *quoting Trincere v City of Suffolk*, 90 NY2d 976, 978 [1997]). There is no per se rule that a defect must be a minimum height or depth to be actionable (*Trincere,* 90 NY2d at 977), but Administrative Code § 19-152(a) provides that a

vertical grade differential between adjacent sidewalk flags greater than or equal to one-half inch constitutes a substantial defect. Nonetheless, "physically small defects [may] be actionable when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot . . . attention to the specific circumstances is always required and undue or exclusive focus on whether a defect is a 'trap' or 'snare'" should not be made (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]).

The nature of the defect may be established by evidence including the plaintiff's testimony, and photographs which accurately depict the accident scene (*Flores*, 147 AD3d 553, 554 (1st Dept 2017). Expert testimony may suffice where it provides measurements regarding the defect and is not conclusory or speculative (*Hutchinson*, 110 AD3d 552, 553 (1st Dept 2013), *aff'd*, 26 NY3d 66 (2015) . The court may decide the issue because "in some instances, the trivial nature of the defect may loom larger than another element . . . [n]ot every injury allegedly caused by an elevated brick or slab need be submitted to a jury" (*Trincere*, 90 NY2d 976, 977. Finally, "[a] defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" (*Hutchinson*, 26 NY3d 66, 79).

Here, the Court finds that Amdar has not met its prima facie burden of establishing the alleged defect is trivial. As an initial matter, its claim that plaintiff identified an "expansion joint" as the defect is not borne out by the record. Plaintiff never used that term, but consistently referred to the defect as a hole. Nor was it ever mentioned at any of the depositions. Rather, it is merely counsel's opinion based on examination of one of the photographs. Amdar has not submitted any other evidence, expert or otherwise, regarding the dimensions and nature of the defect. Furthermore, plaintiff specifically identified the hole was three inches in depth. Due to the resolution of the photographs, and plaintiff's somewhat uncertain authentication of their origin, the court declines defendant's invitation to decide the issue based on its own inspection.

4. Proximate Cause

Amdar argues that the negligence of Dimitrov, as the operator of the vehicle which struck plaintiff, not the alleged defect, was the sole proximate cause of the accident. Amdar contends that, when the vehicle jumped the curb, such was an extraordinary, unforeseeable intervening act by which plaintiff would have been injured regardless of any defect in the sidewalk.

The question of proximate cause is generally a question of fact for a jury" (*Gonzalez v City of New York*, 133 AD3d 65, 67 [1st Dept 2015]; *see Derdiarian v Felix Contracting Corp.*, 51 N.Y.2d 308, 315 [1980]). Certain courts have found under the facts of their cases that a driver's negligence was the sole proximate cause of an accident involving a vehicle on or about a sidewalk (*Britton v Riley-Fann,* 171 AD3d 410, 411 [1st Dept 2019] [complaint did "not allege a basis for imposing a duty of care on them to take preventive action against the unforeseeable risk that a vehicle will mount the sidewalk and strike a pedestrian"]; *Green v Himon*, 165 AD3d 590 [1st Dept 2018] [owner owed no duty to install barriers on the public sidewalk to prevent cars from mounting it and striking pedestrians]; *Sheryll v United Gen. Const.*, 138 AD3d 612 [1st Dept 2016]; *Chowes v Aslam,* 58 AD3d 790, 791 [2d Dept 2009] ["the sole proximate cause of

the plaintiff's injuries was Aslam's negligent operation of her vehicle in swerving toward the sidewalk and applying the accelerator rather than the brakes"]). Although liability may be imposed where the defendant's negligence diverts the plaintiff off the sidewalk and into traffic (*Cherrez v Gonzalez*, 94 AD3d 938, 940 [2d Dept 2012]), or the accident occurs in an area which should have been safeguarded against traffic such as a street excavation site (*Derdiarian*, 51 NY2d 308, 316), those cases do not bear analogy to the case at bar.

Nevertheless, the Court distinguishes the instant matter from the aforementioned line of sidewalk cases for two reasons. First, plaintiff does not allege that defendant breached a general duty to protect sidewalk pedestrians from vehicles, but rather that the alleged defect at issue prevented his escape. Under the circumstances, even if the defect was relatively minor, the exigency of the situation may have "presented a hazard due to factors which made it difficult to detect" and thus rendered it a trap or a snare (*Glickman v City of New York*, 297 AD2d 220, 221 [1st Dept 2002]; *Flores*, 147 AD3d 553, 554 ["Given the circumstances surrounding the accident, namely that plaintiff was attempting to traverse a crowded subway station during morning rush hour, it is evident that plaintiff's observation of the defect, and even the cover board itself, was highly unlikely"]). Further, the court finds this case distinguishable from *Ventricelli v Kinney Sys. Rent A Car, Inc.*, 45 NY2d 950 (1978), where the plaintiff alleged that the negligence of the car rental company in supplying him with a car with a defective trunk lid caused him to be struck by another vehicle during the delay occasioned by his repeated attempts to close it. The plaintiff in *Ventricelli* was not physically prevented from escaping, and, as the court pointed out, "[h]e might well have been there independent of any negligence [defendant], as, for example, if he were loading or unloading the trunk" (*Ventricelli*, 45 NY2d 950, 952).

Second, plaintiff asserts that he sustained injuries from the fall itself and was struck by the van only after hitting the ground. Accordingly, some of his injuries may be attributable to the impact with the sidewalk due to the trip, distinct from the injuries caused by the van. At a minimum, sorting out which injuries were caused by the impact with the sidewalk as opposed to the van creates a genuine issue of material fact (*see O'Hara v New School*, 118 AD3d 480, 481 (1st Dept 2014]).

Based upon the foregoing, Amdar's motion for summary judgment dismissing the complaint as against Amdar and Metro is denied. Being as there is no opposition submitted to the motion by defendants Dimitrov or Harvey, their cross claim against Amdar and Metro is dismissed with prejudice as abandoned. The disposition of the cross claim by The Gap, Inc. is discussed infra.

II. The Gap, Inc.'s Motion to Dismiss (Seq. 002)

The Gap, Inc. moves to dismiss on the grounds that: (1) as a tenant, the Gap has no statutory, contractual, or common law liability for any failure to maintain the sidewalk; and (2) the alleged defect was not the proximate cause of plaintiff's injuries. The motion is granted based upon that plaintiff has failed to proffer any theory that would give rise to a duty running to him from the Gap, making it impossible for plaintiff to establish a negligence case against the Gap notwithstanding the genuine issue of material fact as to proximate cause discussed above.[4]

[4] The Gap argues that plaintiff would have been struck by the van even had he not tripped, citing his testimony that

Plaintiff does not dispute that, under Administrative Code of City of NY § 7-210, the obligation to maintain the sidewalk abutting a property is imposed solely upon the owner (*see Covington v City of New York*, 119 AD3d 408, 409 [1st Dept 2014]), and that a tenant has no duty running to third parties even if it has undertaken in its lease the responsibility to repair or clear the sidewalk (*Collado v Cruz*, 81 AD3d 542, 542 [1st Dept 2011]; *Tucciarone v Windsor Owners Corp.*, 306 AD2d 162, 163 [1st Dept 2003]). Plaintiff nevertheless argues that the Gap has failed to establish that it did not assume liability by making a special use of the sidewalk. This contention fails because the burden of disproving a special use would only fall upon the Gap if the sidewalk defect were located in an area used as a driveway, or in front of a gate or similar installation or implanted object (*see Hernandez v Ortiz*, 165 AD3d 559, 559-60 [1st Dept 2018]; *Marino v Par. of Trinity Church,* 67 AD3d 500, 501 [1st Dept 2009]; *Torres v City of New York*, 32 AD3d 347, 349 [1st Dept 2006]; *Tyree v Seneca Ctr.-Home Attendant Program, Inc.*, 260 AD2d 297, 297 [1st Dept 1999]). At oral argument, plaintiff's counsel conceded that the photographs depicted simply "a New York City sidewalk", with no driveway or other fixtures created for use by the Gap (oral argument tr, 2/27/2019, 17:6-8).

Plaintiff's reliance on the trial court decision in *Wolfe v Gallery Partners, LLC*, 2012 WL 4029790, at *1 (Sup Ct, NY County 2012, Gische, J.) is misplaced. In that case, the sidewalk was admittedly used as a driveway, and the plaintiff did meet her burden of coming "forward with legal and factual arguments that the tenant made special use of the sidewalk" (*Wolfe*, 2012 WL 4029790, *1). Although plaintiff in the instant case speculates that the Gap might have used the area for deliveries, advertising or similar activities, he has presented no proof of such and the Gap is entitled to summary judgment "in the absence of sufficient evidence that it had created the condition or made a special use of the sidewalk," which is sufficient for a prima facie showing of entitlement (*Rodriguez v City of New York*, 48 AD3d 298, 298 [2008]). Moreover, even if there were such evidence with respect to any deliveries to the business, the use of the sidewalk for deliveries would not constitute a special use (*Keech v 30 E. 85th St. Co., LLC*, 154 AD3d 504, 505 [1st Dept 2017]; *Tyree*, 260 AD2d 297, 298).

Finally, plaintiff challenges the authenticity of the Lease. The Court finds that there is no bona fide dispute in this case that Amdar is the owner and the Gap is the tenant, a matter affirmatively pled by plaintiff and admitted by Amdar. As discussed above, a tenant has no duties to third parties regardless of what it has promised to the landlord under the lease.

III. The Gap, Inc.'s Summary Judgment Motion for Indemnification (Seq. 002)

The Gap's motion for summary judgment on its claim for contractual indemnification against Amdar is denied. As relevant here, Article 54 of the Lease provides:

> Owner hereby agrees to indemnify and hold Tenant harmless from all liability, loss and expense resulting from bodily injuries including death, or from injury to or destruction of tangible property occurring on the Demised Premises if caused

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the woman he claimed was right next to him did not escape. Although the question is academic in view of the dismissal of the action as against the Gap, the court notes that plaintiff was not certain whether the other woman actually tripped, and there is no evidence in the record of any woman being stuck other than plaintiff's conjecture based upon seeing her dress on his back.

> by the negligent or intentional act or omission of Owner, its contractors, agents, or employees, or occurring on the Demised Premises prior or subsequent to the term of this lease, or any extensions or renewals thereof, provided, however, that Owner shall be notified within thirty (30) days of any suits, proceedings, claims or demands with respect to which Tenant requests indemnification, and Owner shall have the right to assume the entire control of the defense, compromise or settlement thereof and Tenant shall cooperate fully with owner in such defense.

The Gap cannot recover under this clause for at least two reasons. First, the Lease very precisely defines the "Demised Premises" as "approximately 10,494 square feet of retail space located on the ground floor and basement area of that certain real property commonly known as One Astor Place and that is also known as 750 Broadway" (Fourth Amendment to Lease, Recitals, paragraph A). The accident did not occur "on the Demised Premises", but rather on the sidewalk well outside of the retail space described by the Lease. Had the parties intended to include sidewalk accidents within the scope of the indemnity, they could have easily said so (*see Tower Ins. Co. of New York v. Leading Ins. Grp. Ins. Co.*, 134 AD3d 510 [1st Dept 2015] ["It is clear from the lease agreement that the use of the sidewalk was included in the scope of the demised premises"; *see, e.g., Hong-Bao Ren v. Gioia St. Marks, LLC*, 163 AD3d 494, 496 [1st Dept 2018] [lease provided indemnification for liability "arising to any person or persons or property on, in or about the demised premises or the sidewalk in front of same"). And although the Court of Appeals in *Hogeland v. Sibley, Lindsay & Curr Co.*, 42 NY2d 153 [1977] held that a lease clause providing for indemnification for accidents occurring "in or about the Tenant's demised premises" imposed liability for accidents on the sidewalk, it specifically noted that it was the words "or about" that required inclusion of areas outside the premises (*Hogeland*, 42 NY2d 153, 159 ["the phrase 'in or about' is one of art . . . Defined as 'a phrase having reference to an area and expressing the idea of physical proximity' (Ballantine's Law Dictionary, (3d ed), p. 631), it frequently is used synonymously to mean 'around' or 'on the outside of'."]). Here, the Lease merely refers to accidents "on" the Demised Premises", not "in or about" it.

Second, the Gap has not shown prima facie that it complied with the requirement that it give Amdar the 30-day notice of the claims for which it is claiming indemnification. Rather, it has retained its own counsel to defend against them, and has offered defenses distinct from those interposed by Amdar. This conduct runs contrary to Amdar's contractual right to assume the entire control of the defense of the action. In view of the foregoing, the Gap cannot establish any right to indemnification, and its cross claims seeking such relief are dismissed.

Based upon the foregoing, the Gap's motion in seq. 002 pursuant to CPLR 3212 for summary judgment dismissing the complaint in its entirety is granted, and that branch of the motion which sought summary judgment on its claim for contractual indemnification as against Amdar is denied, and Amdar's motion to dismiss the Gap's cross claim for contractual indemnification is granted. The Gap's other cross claims for common law indemnification, contribution, and failure to procure insurance are dismissed as moot as against Amdar, Dimitrov, and Harvey.

CONCLUSION

Accordingly, it is

ORDERED that motion seq. 002 by defendant The Gap, Inc. pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against it is granted, that branch of its motion that was for summary judgment granting it contractual indemnification from defendant Amdar Company, LLC is denied, and the complaint and all cross claims are dismissed with prejudice as against The Gap, Inc.; and it is further

ORDERED that motion seq. 003 by defendants Amdar Company, LLC and Metro Real Estate Management Co. d/b/a Manocherian Brothers s/h/a The Manocherian Brothers pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims is granted as to the cross claims of defendants Alexander Dimitrov and George E. Harvey, there being no opposition submitted, and is granted as to the cross claims of The Gap, Inc., the cross claims are dismissed with prejudice, and the motion is otherwise denied; and it is further

ORDERED that the action is severed as to The Gap, Inc., and shall continue as against the remaining defendants; and it is further

ORDERED that The Gap, Inc. shall, within 10 days of the NYSCEF filing date of the decision and order on this motion, serve a copy of this order with notice of entry on the clerk, who is directed to enter judgment accordingly; and it is further

ORDERED that the continuing action shall bear the following caption:

----------X
STERE GOGU,

Plaintiffs, Index No.: 161370/2017

- against -

AMDAR COMPANY, LLC, METRO REAL ESTATE MANAGEMENT CO. d/b/a MANOCHERIAN BROTHERS, ALEXANDER DIMITROV and GEORGE E. HARVEY,

Defendants.
----------X

And it is further

ORDERED that The Gap, Inc. shall serve a copy of this order with notice of entry on all parties, on the Clerk of the Trial Support Office (Room 158M), and on the County Clerk—along with a completed "EF-22, Notice to County Clerk – CPLR § 8019(c)," e-filed under category "Non-Motion Documents>Documents not related to a motion/petition/OSC" with a "Document Type" of "Notice to County Clerk CPLR 8019(C)"—within 10 days of the NYSCEF filing date of the decision and order on this motion; and it is further

ORDERED that the County Clerk and the Clerk of the Trial Support Office shall amend their records to reflect the change in the caption described herein.

The foregoing constitutes the decision and order of the Court.

7/15/2019
DATE

HON. ROBERT D. KALISH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

161370/2017 GOGU, STERE vs. THE GAP, INC.
Motion No. 002 003